EFiled: Jun 10 2011 5:25PM EDT
Transaction ID 38088253
Case No. 6301-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE K-SEA TRANSPORTATION PARTNERS L.P. UNITHOLDERS LITIGATION

C.A. No. 6301-VCP

MEMORANDUM OPINION

Submitted: June 3, 2011
Decided: June 10, 2011

Carmella P. Keener, Esq., P. Bradford deLeeuw, Esq., Joseph A. Rosenthal, Esq., ROSENTHAL, MONHAIT & GODDESS, P.A., Wilmington, Delaware; Samuel H. Rudman, Esq., David A. Rosenfeld, Esq., Mark S. Reich, Esq., ROBBINS GELLER RUDMAN & DOWD LLP, Melville, New York; Seth D. Rigrodsky, Esq., Brian D. Long, Esq., Gina M. Serra, Esq., RIGRODSKY & LONG, P.A., Wilmington, Delaware; Eduard Korsinksy, Esq., Eric M. Andersen, Esq., LEVI & KORSINSKY, New York, New York; David L. Finger, Esq., FINGER & SLANINA, LLC, Wilmington; Delaware; Ethan D. Wohl, Esq., WOHL & FRUCHTER LLP; New York, New York; Blake A. Bennett, Esq., COOCH & TAYLOR, P.A., Wilmington, Delaware; *Attorneys for Plaintiffs*.

Srinivas M. Raju, Esq., Jillian G. Remming, Esq., Robert L. Burns, Esq., RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Blair Connelly, Esq., LATHAM & WATKINS LLP, New York, New York; Alan E. Kraus, Esq., LATHAM & WATKINS LLP, Newark, New Jersey; Derrick B. Farrell, LATHAM & WATKINS LLP, Washington, D.C.; *Attorneys for Defendants K-Sea Transportation Partners L.P., K-Sea General Partner L.P., K-Sea General Partner GP LLC, K-Sea IDR Holdings LLC, James C. Baker, Timothy J. Casey, James J. Dowling, Brian P. Friedman, Kevin S. McCarthy, and Gary D. Reaves.*

John L. Reed, Esq., K. Tyler O'Connell, Esq., DLA PIPER LLP, Wilmington, Delaware; Timothy E. Hoeffner, Esq., DLA PIPER LLP, Philadelphia, Pennsylvania; *Attorneys for Defendants Anthony S. Abbate, Barry J. Alperin and Frank Salerno.*

S. Mark Hurd, Esq., Shannon E. German, Esq., MORRIS NICHOLS ARSHT & TUNNELL LLP, Wilmington, Delaware; *Attorneys for Kirby Corp. and KSP Holding Sub LLC.*

PARSONS, Vice Chancellor.

This action is before the Court on a motion to expedite regarding a transaction in which a Delaware limited partnership is to be acquired for either cash or a combination of cash and the acquirer's stock. The merger agreement, which governs the transaction, also calls for an additional payment to the general partner of the target to purchase the general partner's interest and incentive distribution rights ("IDRs"). The agreement was negotiated by representatives of the target's board, including affiliates of the general partner. To resolve any conflict of interest, the board submitted the transaction to a conflicts committee comprised of independent directors to consider whether the transaction was fair and reasonable. The conflicts committee ultimately concluded that the transaction was fair.

Plaintiff-unitholders of the target claim that the process undertaken by the conflicts committee was deficient and, therefore, legally ineffective because: (1) it failed to consider the fairness of payments made to certain conflicted parties; and (2) the independence of the conflicts committee members was tainted by a grant of unvested phantom units they received shortly before merger discussions began. In addition, Plaintiffs contend that the directors failed to provide adequate disclosures to enable the unitholders to make an informed decision as to whether to vote for the transaction. Plaintiffs also assert that they will suffer irreparable harm if prompt equitable relief is not granted because the general partner of the target is controlled by three allegedly single-purpose entities whose sole assets are their interests in the general partner. As a result, plaintiffs assert that these entities will become empty shells unless they are prevented from distributing the consideration they receive in the transaction.

I have carefully considered the parties' submissions and their various arguments. For the reasons stated in this Memorandum Opinion, I deny plaintiffs' motion to expedite.

I. BACKGROUND

A. The Parties

Plaintiffs are common unitholders in Defendant K-Sea Transportation Partners L.P. ("K-Sea").

K-Sea is a Delaware limited partnership and provider of marine transportation, distribution, and logistics services for refined petroleum products in the United States. Other Defendants include the following entities: K-Sea General Partner L.P. ("K-Sea GP"), which is the general partner of K-Sea; K-Sea General Partner GP LLC ("KSGP"), which is the general partner of K-Sea GP; K-Sea IDR Holdings LLC; and KA First Reserve ("KAFR"), which is a Delaware LLC that is a joint venture between private equity firms Kayne Anderson and First Reserve. The complaint also names these individual directors of K-Sea GP as defendants: Anthony S. Abbate, Barry J. Alperin, James C. Baker, Timothy J. Casey, James J. Dowling, Brian P. Friedman, Kevin S. McCarthy, Gary D. Reaves, and Frank Salerno. Alperin, Abbate, and Salerno collectively comprised the K-Sea Conflicts Committee (the "Committee").

B. Facts

In December 2010, months after KAFR made an equity investment in K-Sea, McCarthy, a Kayne Anderson executive and director designee of KAFR, exchanged phone calls and e-mail messages with Joseph H. Pyne, the CEO of the proposed acquirer, Kirby Corporation ("Kirby"). In January 2011, McCarthy, Pyne, and other representatives of Kayne Anderson and First Reserve met. Among other things, they discussed a strategic transaction between Kirby and K-Sea.[1]

On February 2, 2011, McCarthy informed Dowling, the Chairman of the K-Sea Board, of the discussions with Kirby. Two days later, K-Sea and Kirby agreed to extend a confidentiality agreement they previously entered into in connection with strategic discussions in 2008. The same day, K-Sea provided Kirby with confidential financial projections. While due diligence was ongoing, Pyne relayed to McCarthy an offer to purchase K-Sea's common and preferred units for $306 million. This offer was rejected and McCarthy advised Pyne that subsequent offers should account for K-Sea GP's controlling interest and the IDRs. The following day, Kirby increased its offer to $316 million for all of the Partnership's equity interests. This offer was again rejected as inadequate. On February 15, Kirby submitted a revised offer of $329 million, which allocated $18 million for the IDRs.

The next day, the K-Sea Board met and acknowledged "the possible conflict of interest created by the allocation of $18.0 million for the general partner interest and the incentive distribution rights to K-Sea."[2] It adopted resolutions to "(i) reaffirm the membership of the existing K-Sea Conflicts Committee (composed of Messrs. Alperin,

---

1 Defs.' Ans. Br. ("DAB") Ex. D, Kirby Corporation Form S-4 Registration Statement ("Registration Statement"), 44. Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Registration Statement.

2 *Id*. at 45.

Abbate and Salerno), (ii) reaffirm the powers and authority of the K-Sea Conflicts Committee, including the ability to hire independent legal and financial advisors, and (iii) empower the K-Sea Conflicts Committee to make a recommendation to the K-Sea Board of Directors regarding what action should be taken by the K-Sea Board of Directors with respect to the proposed transaction."[3] K-Sea continued to negotiate with Kirby and, on February 28, Kirby offered $8 per common unit with a break-up fee of $30 million to be paid by K-Sea in the event that a superior proposal emerged. Between March 3 and March 10, 2011, K-Sea negotiated further concessions from Kirby such as increasing the offer to common unitholders from $8 to $8.15 per unit, reducing the termination fee from $30 million to $12 million plus up to $3 million in expense reimbursements, and limiting the circumstances under which Kirby could declare a "Material Adverse Effect."

On March 13, 2011, the parties entered into a definitive merger agreement (the "Merger Agreement") under which Kirby would acquire K-Sea for either $8.15 per unit in cash or $4.075 in cash plus .0734 of a share of Kirby per unit. This contemplated transaction (the "Proposed Transaction") represented a 26% premium to the closing price of the Partnership's common units on March 11, 2011. In sum, the offer valued the total equity of K-Sea at $332.1 million and attributed $19.65 million to the general partner units and IDRs owned by Jefferies Capital Partners ("Jefferies"), a private equity fund that is the manager of Furman Selz Investors II L.P. and its affiliated entities, the principal owners of K-Sea Management GP and K-Sea GP.

---

[3] *Id*.

The members of the Committee, Abbate, Alperin, and Salerno, were independent, non-employee directors. In December 2010, shortly before merger discussions began, the K-Sea Board approved a grant of 15,000 phantom common units to each of the independent directors. Upon vesting, a K-Sea phantom unit entitles the grantee to receive a K-Sea common unit or, in the discretion of the compensation committee, the cash equivalent to the fair market value of a K-Sea common unit. Each phantom unit award vests over five years in equal installments, but vests immediately upon a change in control. Previously, Abbate, Alperin, and Salerno had owned, respectively, 28,500, 13,500, and 7,800 common units. There is no allegation, however, that any of these individuals is related to KAFR or will receive any benefit from the $18 million in consideration to be paid for the K-Sea IDRs.

The Committee first met to consider Kirby's proposal on February 18, 2011. Around this time, it hired Stifel Nicolaus & Company ("Stifel") and DLA Piper LLP as financial and legal advisors, respectively. On March 12, the Committee met with DLA Piper and Stifel to consider the Proposed Transaction. At this meeting, Stifel rendered its oral opinion that, from a financial point of view, the merger consideration was fair in terms of (i) the amount to be paid by Kirby to the holders of K-Sea common units (other than Jefferies, KAFR, and their respective affiliates) in connection with the merger pursuant to the Merger Agreement and (ii) for those holders of K-Sea common units (other than Jefferies, KAFR, and their respective affiliates) who will receive Kirby common stock as a part of such consideration, the exchange ratio used in determining the number of shares of Kirby common stock, in each case, to be received by such holders of

K-Sea common units. The Committee then resolved unanimously (i) that the Merger Agreement and the merger are fair and reasonable to K-Sea and its limited partners, (ii) that the Merger Agreement and the merger are approved, which approval constitutes "Special Approval" as defined in K-Sea's partnership agreement, and (iii) that the Committee recommends that the K-Sea Board approve the merger.

Later on March 12, the entire K-Sea Board convened and the Committee unanimously recommended the Proposed Transaction to the full Board. After additional discussion, the K-Sea Board unanimously resolved that the Merger Agreement and the transactions contemplated under it are advisable, fair, and reasonable to and in the best interests of K-Sea, K-Sea GP, and the limited partners of K-Sea. The K-Sea Board further recommended that the unitholders of K-Sea vote to adopt the Merger Agreement and approve the merger.

On March 13, KAFR, EW Transportation LLC, EW Transportation Corp., and EW Holdings Corp.—which collectively represented a majority of K-Sea's unitholders—each entered into support agreements with Kirby, KSP LP Sub, LLC, KSP Merger Sub, LLC, and KSP Holding Sub LLC, pursuant to which they agreed to vote their preferred units and common units in favor of the merger and against any alternative transaction.

C. Procedural History

Plaintiffs filed their original complaint on March 21, 2011. On April 13, I granted an order of consolidation. On May 18, Plaintiffs filed their Verified Consolidated Class Action Complaint along with their Motion to Expedite. On May 23, the K-Sea Defendants filed their Joint Brief in Opposition to Plaintiffs' Motion for Expedited

Discovery, to which Plaintiffs replied on June 1. On June 3, I heard argument on Plaintiffs' Motion.

D. Parties' Contentions

In their Motion to Expedite, Plaintiffs make three primary arguments. First, they assert that the Committee had a duty to consider the fairness of the $18 million allocated to pay for the IDRs in isolation, rather than just evaluating the fairness of the Proposed Transaction as a whole to the Partnership. Second, they contend that Special Approval was not obtained in accordance with the K-Sea Limited Partnership Agreement (the "LPA") because the Committee members' independence was compromised by their receipt of the phantom units, thereby negating the effect of the purported Special Approval. And third, they allege that Defendants' disclosures regarding the Proposed Transaction were misleading. Plaintiffs further assert that they will suffer irreparable harm if expedition is not granted because the entities that own the limited partnership which owns the IDRs essentially are just pass-through entities. Accordingly, Plaintiffs allege that once the General Partner distributes the proceeds of the merger they probably would be unable to collect on any judgment they might obtain in this litigation.

Defendants respond that the Committee's only obligation was to consider the fairness of the transaction to the partnership as a whole, and that they were not required to consider separately the propriety of the $18 million IDR payment. They also contend that rather than creating an improper incentive for the Committee members and compromising their independence, the unvested phantom units actually served to align their incentives more closely with those of the common unitholders. Third, Defendants assert that the only disclosure necessary under the LPA in the event of a merger is one that provides the unitholders with notice of the meeting to vote on the merger and a copy of the Merger Agreement, which they provided. Finally, Defendants argue that no irreparable harm exists because money damages would adequately compensate Plaintiffs, even if the Court finds that Plaintiffs have shown a colorable claim. In that regard, Defendants reject as mere speculation Plaintiffs' professed fear that they will be unable to collect on any judgment they might obtain.

II. ANALYSIS

A. Standard for Expedition

This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause.[4] Nevertheless, the Court "traditionally has acted with a certain solicitude for plaintiffs in this procedural setting and thus has followed the practice of erring on the side of more hearings rather than fewer."[5]

In deciding whether to expedite proceedings, the Court must, in the context of the circumstances of the case, determine "whether . . . the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and

---

4 *Raymond Revocable Trust v. MAT Five LLC*, 2008 WL 2673341, at *2 (Del. Ch. June 26, 2008) (quoting *In re SunGard Data Sys., Inc. S'holders Litig.*, 2005 WL 1653975 (Del. Ch. July 8, 2005)).

5 *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

sometimes substantial) costs of an expedited preliminary injunction proceeding."[6] In doing so, the Court accepts the well-pleaded allegations in the Complaint as true[7] and recognizes that establishing a colorable claim is not an onerous burden for a plaintiff to meet.[8]

B. Have Plaintiffs Asserted a Colorable Claim?

1. Did the Committee have a duty to review the fairness of the $18 million IDR payment?

Plaintiffs contend that the Committee had a duty to consider separately the fairness of the $18 million payment to K-Sea GP in exchange for the IDRs. Defendants, by contrast, assert that the Committee was under no duty to analyze this payment separately and, rather, only had to consider whether the transaction as a whole was fair and reasonable to the common unitholders.

The affairs of K-Sea are governed by the LPA, which acknowledges that inherent conflicts of interest may arise because of the potentially divergent interests of K-Sea GP and the limited partners. Section 7.9(a) details the process for resolving such conflicts of interest:

---

6 *Id*.

7 *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1478537, at *2 (Del. Ch. Oct. 2, 2000).

8 *See id*. (noting that the "colorable claim" standard is lower than the "reasonable probability of success" standard applicable in the preliminary injunction context); *see also In re 3Com S'holders Litig.*, 2009 WL 5173804, at *2 n.10 (Del. Ch. Dec. 18, 2009) (acknowledging that the standard for obtaining expedited proceedings is low); *Reserves Dev. Corp. v. Wilm. Trust Co.*, 2008 WL 4951057, at *2 (Del. Ch. Nov. 7, 2008) (noting that a colorable claim is essentially a non-frivolous cause of action).

> [W]henever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership, the Operating Partnership, any other Group Member, any Partner or Assignee, on the other, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement, of the Operating Partnership Agreement, of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity, *if the resolution or the course of action is, or by operation of this Agreement is deemed to be, fair and reasonable to the Partnership*.[9]

The LPA further provides three ways in which a conflict of interest or the resolution of such conflict "shall be conclusively deemed fair and reasonable to the Partnership."[10] One of those ways is if the "conflict of interest or resolution is (i) approved by Special Approval (as long as the material facts known to the General Partner or any of its Affiliates regarding any proposed transaction were disclosed to the Conflicts Committee at the time it gave its approval) . . . ."[11] The LPA defines "Special Approval" as approval by a majority of the members of the Conflicts Committee.[12]

Plaintiffs have failed to allege facts sufficient to state a colorable claim that the process followed by the Committee does not comply with the requirements of § 7.9(a). First, Plaintiffs have not alleged any specific facts indicating that material facts known to K-Sea GP or its affiliates regarding the Proposed Transaction were not disclosed to the

---

9 DAB Ex. A, LPA, § 7.9(a) (emphasis added).

10 *Id*.

11 *Id*.

12 *Id*. § 1.1.

Committee. Moreover, the actions taken by the Committee to vet the Proposed Transaction went above and beyond what the LPA required. For example, the Committee obtained a fairness opinion from Stifel relating to the merger consideration to be received by the common unitholders.

Second, after the Stifel presentation, the Committee approved resolutions that, among other things, stated its conclusions "(i) that the merger agreement and the merger are fair and reasonable to K-Sea and its limited partners, [and] (ii) that the agreement and the merger are approved, which constitutes "Special Approval" as defined in K-Sea's partnership agreement."[13] Therefore, the Committee also took the necessary step of determining that the Proposed Transaction was fair and reasonable to K-Sea. Plaintiffs have not alleged any facts or articulated any persuasive argument to suggest that the LPA required any further consideration. Accordingly, Plaintiffs' allegations that the Committee breached its duties by not separately considering the $18 million payment to the General Partner fail to state a colorable claim.

2. Did the phantom unit grant compromise the Committee members' independence and thereby negate its Special Approval?

Plaintiffs next contend that the December 2010 grant of phantom units impermissibly compromised the independence of the members of the Committee because, in the absence of a change of control transaction, these units would not fully vest for five years. Under the LPA, members of the Committee are required to be

[13] Registration Statement 49.

independent.[14] Based on the accelerated vesting of the phantom units attendant to the Proposed Transaction, Plaintiffs argue that the Committee was not properly constituted under the LPA and, therefore, was unable to grant Special Approval deeming the transaction to be fair and reasonable. Because Defendants do not allege that the conflict of interest was otherwise conclusively resolved in accordance with the LPA, Plaintiffs argue that the Proposed Transaction is susceptible to attack on the ground that it is not fair and reasonable. Defendants counter that the grant of phantom units occurred before any merger discussions had begun and, in any event, aligned the interests of the Committee members with those of the common unitholders.

For purposes of Plaintiffs' Motion to Expedite, Defendants concede that whether the Committee properly resolved the conflict of interest depends on whether the procedure followed comports with the Special Approval process outlined in the LPA. That is, Defendants admit that the other two paths outlined in § 7.9(a) for conclusively resolving the conflict were not followed, and I note that, for purposes of the pending preliminary motion, they have not attempted to prove that the Proposed Transaction otherwise was fair and reasonable to the Partnership. Special Approval requires

---

14 LPA § 1.1. Conflicts Committee is defined as a "committee of the Board of Directors of the General Partner composed entirely of two or more directors who are not (a) security holders, officers or employees of the General Partner, (b) officers, directors or employees of any Affiliate of the General Partner or (c) holders of any ownership interest in the Partnership Group other than Common Units and who also meet the independence standards required of directors who serve on an audit committee of a board of directors by the Securities Exchange Act of 1934, as amended, or the rules and regulations of the Commission thereunder and by the National Securities Exchange on which the Common Units are listed for trading."

ratification by a Conflicts Committee composed of independent directors.[15] Therefore, if the Defendant Committee members' independence arguably was compromised, Plaintiffs would have asserted a colorable claim that its Special Approval of the Proposed Transaction as fair and reasonable to the Partnership is ineffective. In the absence of a safe-harbor Special Approval, Plaintiffs would have asserted at least a colorable claim that the transaction was vulnerable to an argument that it was not fair and reasonable.

In support of their argument that the phantom units properly align the incentives of Directors with the common unitholders when considering the terms of a merger, Defendants cite to *Globis Partners, L.P. v. Plumtree Software*.[16] In that case, the Court held that "[t]he accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price."[17] Importantly in *Globis*, however, the value of the directors' unvested options in the target, Plumtree Software, was greatly outweighed by the value of their unrestricted holdings. Accordingly, the Court found that it was unlikely that the defendant directors' decision-making would be skewed by the relatively small benefit they would receive from having a small portion of their holdings vest immediately in comparison to the potentially negative impact of selling their much larger unrestricted holdings at an unreasonably low price. Moreover, the timing of the grants in *Globis* appeared to be unrelated to consideration of the transaction at issue.

[15] LPA §§ 1.1, 7.9(a).

[16] 2007 WL 4292024 (Del. Ch. Nov. 30, 2007).

[17] *Id*. at *9.

In contrast to the relatively modest size of the Plumtree directors' unvested options, the phantom common units granted to Committee members here constituted a significant portion of their total holdings in K-Sea. Before the December 2010 grant of 15,000 phantom common units, Abbate, Alperin, and Salerno owned, respectively, 28,500, 13,500, and 7,800 common units of K-Sea. Therefore, the award approximately doubled their collective interest in K-Sea. Based on the limited record available at this preliminary stage of the litigation, I cannot rule out the possibility that the prospect of the immediate vesting of the phantom units may have biased the Committee members' judgment in favor of the Proposed Transaction. Furthermore, the grant occurred just days or weeks before negotiations began in late December 2010 or early January 2011 between representatives of K-Sea and Kirby. The closely correlated timing of the grant supports an inference that it might have been made with an intent to influence the Committee members' consideration of a potential transaction. Therefore, Plaintiffs have articulated at least a colorable claim that the Proposed Transaction was not fair and reasonable because Defendants' receipt of the phantom common units may have tainted the Committee's independence, thereby nullifying the effect of their Special Approval.

3. Were the disclosures provided by Defendants materially misleading?

Plaintiffs also allege that the disclosures provided to common unitholders in the Registration Statement were materially misleading. In that regard, they argue that the LPA did not alter the traditional fiduciary duties of Defendants with regard to necessary disclosures. Specifically, Plaintiffs claim that Defendants' disclosures were misleading because they stated that the Company negotiated a 9.7% increase in consideration between Kirby's initial and final offers, when common unitholders, in fact, received only a 2.1% increase. Second, Plaintiffs assert that the disclosures were misleading because they stated that "the members of the K-Sea Conflicts Committee will not personally benefit from the completion of the merger in a manner different from the K-Sea unitholders" without disclosing that the Proposed Transaction would cause the phantom units they recently received to vest immediately. In response, Defendants contend that the LPA expressly limits their duties of disclosure and that, in the event of a merger, they only were required to provide a copy of the merger agreement and notice of the meeting to vote on the merger.

Consistent with the underlying policy of freedom of contract espoused by the Delaware Legislature, limited partnership agreements are to be construed in accordance with their literal terms.[18] "The operative document is the limited partnership agreement and the statute merely provides the 'fall-back' or default provisions where the partnership agreement is silent."[19] Only "if the partners have not expressly made provisions in their partnership agreement or if the agreement is inconsistent with mandatory statutory provisions, . . . will [a court] look for guidance from the statutory default rules, traditional

18 *In re Nantucket Island Assocs. P'ship Unitholders Litig.*, 810 A.2d 351, 361 (Del. Ch. 2002).

19 *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 1456494, at *5 (Del. Ch. Nov. 5, 2001) (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *21 (Del. Ch. Mar. 13, 2000)).

notions of fiduciary duties, or other extrinsic evidence."[20] By focusing on the partnership agreement, the courts give "maximum effect to the principle of freedom of contract"[21] and maintain the preeminence of the intent of the parties to the contract.[22]

As recently confirmed in *Lonergan v. EPE Holdings, LLC*, a limited partnership agreement can "establish[] a contractual standard of review that supplants fiduciary duty analysis."[23] In support of their argument that the LPA did not modify Defendants' duty of disclosure and that they therefore owed traditional fiduciary duties, Plaintiffs cite to Section 2.1 of the LPA, which states:

> Except as expressly provided to the contrary in this Agreement, the rights, duties (including fiduciary duties), liabilities and obligations of the Partners and the administration, dissolution and termination of the Partnership shall be governed by [the Delaware Revised Uniform Limited Partnership Act ("DRULPA")].[24]

According to Plaintiffs, no other provision in the LPA modifies the K-Sea directors' traditional duties of disclosure.

---

20 *In re LJM2 Co-Inv., L.P.*, 866 A.2d 762, 777 (Del. Ch. 2004) (citing *Sonet v. Timber Co.*, 722 A.2d 319, 323 (Del. Ch. 1998)).

21 6 *Del. C.* § 17-1101(c).

22 *See* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 Del. J. of Corp. L. 1 (2007); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent").

23 5 A.3d 1008, 1020 (Del. Ch. 2010).

24 6 *Del. C.* §§ 17-101 to -1111.

Defendants correctly point out, however, that certain other provisions of the LPA tightly circumscribe the duties of K-Sea GP and its directors. First, § 7.9(a) provides that:

> In the absence of bad faith by the General Partner, the resolution, action or terms so made, taken or provided by the General Partner with respect to [a potential conflict of interest] shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or, to the extent permitted by law, under the Delaware Act or any other law, rule or regulation.[25]

This section can be read to eliminate traditional fiduciary duties so long as the persons involved comply with the prescribed process or requirements for resolving conflicts of interest. Second, § 14.3 details the procedure that must be followed to gain approval of the limited partners of a merger or consolidation. The only information K-Sea is required to provide in that situation is "[a] copy or a summary of the Merger Agreement . . . with the notice of a special meeting or the written consent." Given the significant weight afforded to parties' freedom to contract, I read this provision as reflecting the parties' intent to preempt fundamental fiduciary duties of disclosure, limiting the requirements to those detailed in the LPA. Under the plain language of the LPA, therefore, Defendants were required to provide only a copy of the Merger Agreement along with a notice of the shareholder meeting. K-Sea satisfied each of these requirements. Therefore, because the LPA appears to have eliminated traditional fiduciary duties and Defendants complied

---

[25] LPA § 7.9(a).

with the disclosure requirements under § 14.3, I conclude that Plaintiffs have failed to assert a colorable claim that Defendants failed to comply with their duty of disclosure.

Moreover, even if Defendants had a higher duty of disclosure, Plaintiffs have not shown that either of the disclosures about which they complain was misleading. K-Sea's Registration Statement fairly can be read to indicate that the entire consideration being paid for K-Sea—and not just that being received by common unitholders—represented a 9.7% increase over Kirby's initial offer. Indeed, the Registration Statement contains all of the information necessary for shareholders to calculate the actual increase represented by the price in the Merger Agreement over Kirby's initial offer. I also am not persuaded that Defendants misled K-Sea unitholders by saying that "Conflict Committee members [would] not personally benefit in a manner different from K-Sea unitholders . . . ." This statement implies that the interests of the Committee members are aligned with those of the common unitholders. Generally, this is true because the Committee members' holdings in K-Sea consisted only of common units and phantom units, whose value was derived from that of common units. Therefore, a higher merger price would increase the value of the holdings of Committee members and K-Sea unitholders by the same percentage. Finally, K-Sea's Registration Statement explicitly discloses that Defendants' phantom unit holdings would be accelerated if the merger was effected.[26] Therefore, Plaintiffs have not articulated a colorable claim that the disclosures made by Defendants were misleading.

[26] Registration Statement 84.

C. Have Plaintiffs Shown Irreparable Harm?

1. Are money damages sufficient?

Having shown that at least one of their claims is colorable, Plaintiffs also must demonstrate that they will suffer irreparable harm if expedition is not granted. Plaintiffs have failed, however, to refute Defendants' argument that money damages will provide an adequate remedy for any harm suffered by K-Sea's unitholders. Defendants assert that money damages are sufficient for two reasons. First, they contend that the relief sought by Plaintiffs—an injunction that would require the $18 million payment to K-Sea GP for the IDRs essentially to be held in escrow until the conclusion of this action—essentially is a claim for money damages.[27] Second, they cite a number of Delaware cases that have held money damages to be an adequate remedy for allegations that a transaction price is not fair, which is what Plaintiffs argue in this instance.

This Court is reluctant to enjoin a premium transaction where there is no superior bid on the table and repeatedly has held that money damages are sufficient to remedy a claim that a transaction price is inadequate.[28] Indeed, money damages have been held to be sufficient even in circumstances in which a transaction seemed unlikely to withstand

[27] Plaintiffs say that "[t]he remedy [they] seek for the substantive wrong here at issue – a limited injunction that would allow the deal to close, subject to the wrongful $18 million side-payment being withheld from the General Partner – is closely comparable to the remedy routinely granted for disclosure violations." Pls.' Rep. Br. ¶ 15.

[28] *In re Cogent Inc. S'holders Litig.*, 7 A.3d 487, 515 (Del. Ch. 2010); *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672 698, at *3 (Del. Ch. Nov. 15, 1994) ("there is no plausible reason why a money award would not be fully sufficient" to satisfy plaintiff's claims that the directors failed to obtain the highest price for the company).

entire fairness review.[29] Therefore, because no other offer was reasonably available to K-Sea unitholders and Plaintiffs focused their request for relief on the $18 million General Partner payment, I am convinced that money damages are an adequate remedy for Plaintiffs' claims.

2. Does Plaintiffs' speculation that they will be unable to collect constitute irreparable harm?

While only half-heartedly contesting the adequacy of money damages, Plaintiffs rely heavily on their speculation that they will have a difficult time collecting on any judgment they might be awarded. Plaintiffs predict that collection will be difficult, if not impossible, because 90% of the economic interest in K-Sea GP and the IDRs is owned by single-purpose limited partnerships whose sole asset is their indirect ownership interest in K-Sea. Therefore, under Plaintiffs' theory, by the time they seek to collect on any judgment, these entities likely will be mere shells and essentially judgment proof. Defendants counter that Plaintiffs bear the burden of proof on their collectability argument and have not met that burden.

In support of their argument, Plaintiffs rely on three cases, which all indicate that irreparable harm *may* be shown if a plaintiff demonstrates that he will be unable to collect on a judgment or if there is a substantial likelihood that he will not be able to do so.[30] In

---

29 *See In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 420 (Del. Ch. 2010) (refusing to enjoin a tender offer where plaintiff was likely to succeed in demonstrating merger was unfair because money damages were adequate).

30 *See Cty. of York Empls. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *8 (Del. Ch. Oct. 28, 2008); *Gradient OC Master, Ltd. v. NBC Universal, Inc.*,

County of York, the court found that the possibility of irreparable harm sufficient to warrant expedition existed "[w]here, as here, damages that may be available are difficult to calculate and other uncertainties, such as collectibility exist . . . ."[31] Unlike that case, however, the damages at issue here do not appear to be uncertain or difficult to calculate. Rather, the damages may well be limited to all or part of the contested $18 million payment that is to be made to the General Partner. Even if that is not true, however, Plaintiffs' damages also might include an additional component related to an adjudicated valuation of K-Sea above the transaction price. Such a valuation would not be unduly difficult to determine.

Moreover, the plaintiff in *County of York* had made some showing that collecting on a judgment would be difficult because of the defendant's rapidly diminishing share price. In contrast, the Plaintiffs here have not shown that collection is likely to be difficult. Instead, their doubts in that regard are based on mere speculation. In both *Gradient* and *CNX Gas*, the court found irreparable harm to be lacking because the plaintiffs made no showing that the defendant was insolvent or otherwise unlikely to be able to satisfy any judgment.[32] The same is true in this case. While Plaintiffs question

---

930 A.2d 104, 134 (Del. Ch. 2007); *In re CNX Gas Corp. S'holder Litig.*, 4 A.3d 397, 420 (Del. Ch. 2010).

31 *Cty. of York*, 2008 WL 4824053, at *8.

32 *See Gradient*, 930 A.2d at 134 (no irreparable harm where "[t]he Plaintiffs have not presented any credible evidence that ION is insolvent, is likely imminently to become insolvent, or would otherwise be unable to compensate Plaintiffs for any monetary harm they might suffer if the Exchange Offer is consummated."); *In re CNX Gas Corp.*, 4 A.3d 397 at 420 (injunction not granted where "[n]o question

whether they will be able to collect on a judgment, they have not alleged facts sufficient to support a reasonable inference that none of the named Defendants or those closely associated with them in regard to the Proposed Transaction could satisfy a judgment. In addition, if Plaintiffs prove their claims on the merits, they likely may be able, if necessary, to enforce a judgment against the individual limited partners holding stakes in the limited partnerships which own about 90% of K-Sea GP. On the record presented, Plaintiffs' allegations are simply too speculative to support the required showing of irreparable harm.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I deny Plaintiffs' Motion to Expedite.

IT IS SO ORDERED.

---

has been raised, much less evidence presented, to cast doubt on CONSOL's solvency or ability to satisfy a damages award").